

Fee Control No. 00000RROG-03-081

² See Letter from Mark A. Reger, Chief Financial Officer of the Federal Communications Commission to James Tilton, West Beach Broadcasting, dated May 30, 2002 (West Beach letter).

mailed the payment in sufficient time for it to reach the Mellon Bank in Pennsylvania.³ Lastly, McLeodUSA argued that the Commission's FY 2002 regulatory fee system was "likely unconstitutional" because it violated Article I, Section 7, Clause 1, which requires that "all Bills for raising Revenues shall originate in the House of Representatives."⁴

3. On March 24, 2003, the Office of Managing Director (OMD) denied McLeodUSA's request for waiver of the late charge penalty.⁵ OMD stated that the Communications Act of 1934, as amended, requires the Commission to assess a late charge penalty of 25 percent on any regulatory fee not paid in a timely manner. OMD also cited the Commission's rules, 47 CFR Section 1.1164, which provide that "[a]ny late payment or insufficient payment of a regulatory fee, not excused by bank error, shall subject the regulatee to a 25 percent penalty of the amount of the fee ... which was not paid in a timely manner. A timely fee payment ... is one received at the Commission's lockbox bank by the due date specified by the Commission or by the Managing Director." OMD stated that with respect to FY 2001 regulatory fees, it granted waivers to this rule in some instances in which it found that the untimely receipt of the fee was the result of the clearly unforeseeable events of September 11, 2001, including the ensuing interruption of mail and air courier service. OMD found that, by contrast, no such extraordinary circumstances existed to justify waiver of the rule with respect to the FY 2002 fee requirement.

4. OMD also found that McLeodUSA's constitutional challenge was without merit. OMD noted that Section 9 of the Communications Act, as amended, provides that the Commission shall assess and collect regulatory fees to recover the costs of specific regulatory activities of the Commission. Citing *United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990) and *Sperry Corp. v. United States*, 925 F.2d 399 (Fed. Cir. 1991), OMD found that a statute that provides for monetary assessments to fund a particular government program, as does Section 9, "is not a 'Bill for raising Revenue' within the meaning of the Origination Clause."

5. In its Application for Review, McLeodUSA argues that OMD did not adequately explain its decision to deny McLeodUSA's waiver request and reiterates its previous arguments. It also states that while the events of September 11, 2001 were "clearly unforeseeable," the widespread disruption in the mail service that was occurring at the time the 2001 regulatory fees were due clearly was not unforeseeable, as evidenced by the Commission's decision to move the regulatory fee filing deadline forward by five days. Moreover, McLeodUSA argues that if the Commission believed that five days was a sufficient amount of time for a regulatory fee payment to be received by the Mellon Bank from Washington State in the case of West Beach during a time when major mail disruptions were well-known, then five days was clearly a sufficient amount of time for McLeodUSA's regulatory fee payment to be received by the Mellon Bank from Iowa, a state 1,900 miles closer during a time when no widespread disruptions of mail service were occurring. McLeodUSA also submits that even under normal circumstances mail delays occur, and a company should not be penalized 25% for an interruption that it cannot control. It states that granting a waiver to McLeodUSA would be appropriate because McLeodUSA made as much of a good faith effort to timely submit payment of its regulatory fees as West Beach did.

6. McLeodUSA also asserts that the OMD decision did not adequately address the constitutional challenge it raised and does not demonstrate how the regulatory fee system falls under the *Munoz-Flores* exception to the Origination Clause requirement. More specifically, McLeodUSA states that Section 9 of

³ See Letter from Mark A. Reger, Chief Financial Officer of the Federal Communications Commission to Michael O. Ostbye, Rural Services of Central Minnesota, dated May 1, 2002 (Ostbye Letter).

⁴ U.S. Const. Art. I, Sect. 7, cl. 1.

⁵ Letter from Mark A. Reger, Chief Financial Officer of the Federal Communications Commission, to David R. Conn, Deputy General Counsel of McLeodUSA Telecommunications Services, Inc., dated March 24, 2003.

the Act does not create a particular program that the regulatory fees are used to support, but instead raises revenues to support the government and the Commission generally. Finally, McLeodUSA cites another proceeding in which similar constitutional issues were raised, where OMD found that "there was some ambiguity concerning the Commission's policies for implementation of the provisions of Section 9 of the Act ... requiring assessment of a 25 percent penalty for late payment."⁶ McLeodUSA states that based on these ambiguities, OMD waived the late charge

II. DISCUSSION

7. We conclude that the Managing Director's decision is correct. As OMD stated, Section 9(c)(1) of the Communications Act of 1934, as amended, requires the Commission to assess a late charge penalty of 25 percent on any regulatory fee not paid in a timely manner.⁷ The Commission's rules, also cited by OMD, provide that "a timely fee payment ... is one received at the Commission's lockbox bank by the due date specified by the Commission or by the Managing Director."⁸ In the rulemaking that implemented Section 9(c)(1), the Commission rejected arguments that it consider a regulatory fee payment to be timely submitted if the payment is postmarked by the date it is due.⁹ Instead, the Commission determined that a regulatory fee is untimely paid when it is not received at the lockbox bank by the payment date, citing the need to process payments efficiently.¹⁰ The Commission has specifically rejected arguments that its rules implementing Section 9(c)(1) are too strict. *See Aerco Broadcasting Corporation*, 16 FCC Rcd. 15,042 (2001) (upholding OMD's denial of waiver of late charge penalty where payment was mailed two days before the deadline and where preparations for a hurricane could have delayed delivery of the payment). Insofar as McLeodUSA believes that the Commission should adopt a more lenient definition of what constitutes a timely fee payment, McLeodUSA's proposal is more appropriately raised in a petition for rulemaking. In addition, as we stated in *Aerco*, 16 FCC Rcd at 15043, "Section 1.1158 of the Commission's rules permits payment of regulatory fees in forms that would not be affected by extrinsic factors, such as the uncertainties associated with the timing of mail delivery.... The rules allow electronic transfer of funds, thus providing greater certainty of timely delivery. This permits licensees to account for individual circumstances in choosing how to meet their obligations to make payment in a timely manner."

8. As OMD stated, with respect to FY 2001 regulatory fees, it did not impose the 25% penalty in some instances in which it found that the untimely receipt of the fee was the result of the clearly unforeseeable events of September 11, 2001, including the ensuing interruption of mail and air courier service. As McLeodUSA states, however, OMD did not grant waivers in all cases in which a waiver was sought for late payment of FY 2001 regulatory fees, but only where the untimely receipt of the fee was a direct result of the interruption of mail and air courier service in the aftermath of the events of September 11, 2001.¹¹ Thus, only in the most extraordinary circumstances has the Commission waived its late charge penalty for FY 2001 regulatory fees. Like OMD, we find that no comparable extraordinary circumstances existed to justify waiver of the 25% penalty with respect to McLeodUSA's FY 2002 fee

⁶ *Id.* at n.17, citing Letter from Mark A. Reger, Chief Financial Officer of the Federal Communications Commission, to Dennis J. Kelley, Esq., dated June 24, 2002 (Kelley letter).

⁷ 47 U.S.C. Section 159(c)(1)

⁸ 47 CFR Section 1.1164.

⁹ *Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, Report and Order, 9 FCC Rcd 5333, 5353 (1994).

¹⁰ *Id.* at 5353, n.23.

¹¹ See Ostbye Letter, where OMD denied petitioner's request for a waiver of a late charge penalty where the regulatory fee was mailed one day before the due date, thus not ensuring sufficient time for a timely receipt

requirement. Moreover, the OMD's decision in *West Beach* does not stand for the blanket proposition that all fees mailed five days in advance of the filing deadline will be accepted without penalty, even if received one day late. The decision makes clear that, but for the extraordinary events of September 11, 2001, a waiver would not be granted.

9. Here, the Commission's Payment Detail Report verifies that Mellon Bank, the Commission's lockbox bank, received McLeodUSA's FY 2002 regulatory fees on September 26, 2002, a day after the deadline. Thus, McLeodUSA's fee payment was not timely submitted, and no extraordinary circumstances existed which would justify a waiver of the late charge penalty. Accordingly, the 25 percent late charge penalty is due.

10. We also disagree with McLeodUSA that Section 9 runs afoul of the Origination Clause of the Constitution, which requires that "[a]ll Bills for raising Revenue shall originate in the House of Representatives, but the Senate may propose or concur with Amendments as on other Bills." Section 9 is part of the Omnibus Budget Reconciliation Act of 1993, which was introduced in the House on May 25, 1993 (H.R. 2264). Section 9 itself was added in conference but also had its genesis in a "virtually identical" provision in a predecessor bill, H.R. 1674, that the House, though not the Senate, passed in the previous 102d Congress. See House Conf. Rep. No. 213, 103rd Cong., 1st Sess. 1188 ("the fee provisions contained in this section are virtually identical to those contained in H.R. 1674, which passed the House in 1991. To the extent applicable, the appropriate provisions of the House Report (H.R. Rep. 102-207) are incorporated herein by reference.") Further, the House was the first chamber to pass H.R. 2264 as reported out of Conference, including the Section 9 regulatory fee provisions. In any event, section 9 is not a "bill for raising revenue" because it establishes fees to support a specific government program and does not raise revenue to support government generally. See *United States v. Munoz-Flores*, 495 U.S. 385, 397-98 (1990); see also "Policies of the Chair," Congressional Record, vol. 137, Jan. 3, 1991, p. 66 (defining "non-revenue receipts" not subject to the Origination Clause). Finally, the statement in the Kelley letter that MacLeod cites referred not to the constitutionality of Section 9 but to ambiguity concerning implementation of the provisions of Section 9 in connection with the collection of FY 1998 regulatory fees, which is not a matter in issue here.

11. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by McLeodUSA on April 23, 2003 IS DENIED.

12. IT IS FURTHER ORDERED that McLeodUSA IS DIRECTED to submit payment in the amount of \$92,064.78 and FORM FCC 159 within 30 days from the release of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
CONCURRING**

Re McLeodUSA Telecommunications Services, Inc., Application for Review

The Commission today addresses a situation in which a company mailed the regulatory fees it owed to the Commission five days prior to the deadline. The check was processed one day after the deadline, and for this one day, McLeodUSA was penalized over \$90,000 – a 25 percent penalty. I concur in the decision because the statute and our rules require such a penalty. I am disappointed, however, that the Commission does not seek comment on approaches that could address such situations in the future. For example, the FCC bases the deadline for its schools and libraries universal service program on the postmark date of the filing. The IRS uses a similar method for payment of taxes. Using the postmark date or some other alternative might better take into account those who are located further away or who face unforeseen delays in mail delivery that are beyond their control.

**Federal Communications Commission
BILL FOR COLLECTION**

FOR INQUIRIES CALL
1-202-418-1995
(Credit and Debt Management Group)

Bill Number	Current Bill Date	Please write your bill number on your remittance. Payable to: Federal Communications Commission Send a copy of this bill to: Federal Communications Commission REVENUE & RECEIVABLE OPER. P.O. BOX 358325 PITTSBURGH, PA 15251-5325 <i>RR 0G 3584</i>
FY02-9-0005	11/19/02	

McLeodUSA Telecommunications Services, Inc.
 6400 C St. S.W.
 Cedar Rapids, IA 52408-3177

Total Amount Due	Total Amount Due Must Be Received By	Due Date
\$92,064.78		12/19/02

SPECIAL INSTRUCTIONS (OPTIONAL):
 25% LATE PENALTY FINE FOR FY 2002 REGULATORY FEE(S) RECEIVED AFTER SEPTEMBER 25,2002

Please attach a copy of this bill to your payment to ensure proper credit.

Payment Type Code	Quantity	Fee Due	
0 2 9 9	1	\$92,064.78	\$92,064.78
Total Due			\$92,064.78

Payment Method: Check ☐ (Attach)
 Credit card ☐ (Complete Below)

☐ MasterCard

☐ VISA

Account No

--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--

Expiration:

Month			Year	

I hereby authorize the FCC to charge my MasterCard or VISA for the service(s) / authorization(s) herein described.

AUTHORIZED SIGNATURE

DATE

FCC FORM 159-W
July 2001

Payment Transactions Detail Report

Date: 11/07/2003

BY: FEE CONTROL NUMBER

Fee Control Number	Payor Name	Fcc Account Number	Payer TIN	Received Date							
0209308835057002	MC LEODUSA BOX 3177	WP00054495	0000000000	19/26/2002 00:00:01							
					CEDAR RAPIDS	IA	52406				
Payment Amount	Current Balance	Seq Num	Payment Type Code	Quantity	Callsign Other Id	Applicant Name	Applicant Zip	Bad Check	Detail Amount	Trans Code	Payment Type
\$368,259.10	\$368,259.10	1	0272	10000000	8095722002	MC LEODUSA TELECOMMUNICATIONS	524063177		\$30,600.00	1	PMT
\$368,259.10	\$368,259.10	2	0272	10000000	8095722002	MC LEODUSA TELECOMMUNICATIONS	524063177		\$30,600.00	1	PMT
\$368,259.10	\$368,259.10	3	0272	10000000	8095722002	MC LEODUSA TELECOMMUNICATIONS	524063177		\$30,600.00	1	PMT
\$368,259.10	\$368,259.10	4	0272	10000000	8095722002	MC LEODUSA TELECOMMUNICATIONS	524063177		\$30,600.00	1	PMT
\$368,259.10	\$368,259.10	5	0272	10000000	8095722002	MC LEODUSA TELECOMMUNICATIONS	524063177		\$30,600.00	1	PMT
\$368,259.10	\$368,259.10	6	0272	10000000	8095722002	MC LEODUSA TELECOMMUNICATIONS	524063177		\$30,600.00	1	PMT
\$368,259.10	\$368,259.10	7	0272	10000000	8095722002	MC LEODUSA TELECOMMUNICATIONS	524063177		\$30,600.00	1	PMT
\$368,259.10	\$368,259.10	8	0272	10000000	8095722002	MC LEODUSA TELECOMMUNICATIONS	524063177		\$30,600.00	1	PMT
\$368,259.10	\$368,259.10	9	0272	10000000	8095722002	MC LEODUSA TELECOMMUNICATIONS	524063177		\$30,600.00	1	PMT
\$368,259.10	\$368,259.10	10	0272	10000000	8095722002	MC LEODUSA TELECOMMUNICATIONS	524063177		\$30,600.00	1	PMT
\$368,259.10	\$368,259.10	11	0272	10000000	8095722002	MC LEODUSA TELECOMMUNICATIONS	524063177		\$30,600.00	1	PMT
\$368,259.10	\$368,259.10	12	0272	10000000	8095722002	MC LEODUSA TELECOMMUNICATIONS	524063177		\$30,600.00	1	PMT
\$368,259.10	\$368,259.10	13	0272	692225	8095722002	MC LEODUSA TELECOMMUNICATIONS	524063177		\$1,059.10	1	PMT
Total	13								\$368,259.10		



Non-Public For Internal Use Only

Page 1 of 1
Friday, November 07 2003 11:37 AM

RAMIS ACCOUNT RECEIVABLES

Form 159 Receipt Report (Date Received)

0209308835057002	0003716073	MC LEOUSA	9/26/02	8095722002	24069222500	000	0421407242	0272	*****	\$368,259 10
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Grand Total \$368,259 10

00000 RR06-03-081

RECEIVED

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

2003 APR 25 P 7 17

ACCOUNT PROCESSING
GROUP-DPT/RPT/TMT

THE WASHINGTON HARBOUR
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500
FACSIMILE (202) 424-7645
WWW.SWIDLAW.COM

NEW YORK OFFICE
THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NY 10174
TEL (212) 973-0111
FAX (212) 891-9598

April 23, 2003

VIA COURIER

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Vistronix, Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

RECEIVED

APR 23 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

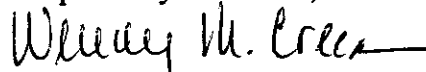
Re: McLeodUSA Telecommunications Services, Inc.
Application for Review of OMD Decision
Fee Control No. 00000RR06-03-063 ✓

Dear Secretary Dortch:

On behalf of McLeodUSA Telecommunications Services, Inc. ("McLeodUSA" or "Company"), enclosed for filing with the Federal Communications Commission ("Commission") is McLeodUSA's Application for Review of the Office of Managing Director's ("OMD") ✓ March 24, 2003 decision denying McLeodUSA's request for waiver of a late payment penalty for the Company's 2002 regulatory fees.

An original and four (4) copies of this Application for Review are enclosed for filing. Please contact the Wendy Creeden at 202-295-8532 if you have any questions regarding this matter.

Respectfully submitted,



Richard M. Rindler
Wendy M. Creeden

Counsel for
McLeodUSA Telecommunications Services, Inc.

Enclosures

cc: David Conn (McLeodUSA)
Danielle C. Burt (SBSF)

ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

RECEIVED

APR 23 2003

In the Matter of)
)
McLEODUSA TELECOMMUNICATIONS)
SERVICES, INC.)
)
Request for Waiver of Late Charge Penalty)
For FY 2002 Regulatory Fees)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Fee Control No: 00000RR06-03-063

To: The Commission

APPLICATION FOR REVIEW

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA" or "Company"),
pursuant to section 1.115 of the Federal Communications Commission's ("Commission") rules,
47 C.F.R. §1.115, hereby submits this Application for Review of a decision issued
March 24, 2003 by the Office of the Managing Director ("OMD"), denying McLeodUSA's
request for waiver of a late payment penalty for the Company's 2002 regulatory fees ("OMD
Decision").¹ Commission review is appropriate in this case, and the OMD Decision should be
overturned, because that action: (1) is in conflict with established Commission policy and (2) is
in conflict with established legal authority. McLeodUSA respectfully requests that the
Commission overturn the OMD Decision and set aside the penalty imposed on McLeodUSA. In
support hereof, the following is respectfully shown:

I. BACKGROUND

McLeodUSA is a competitive telecommunications service provider, offering integrated
local, long distance, Internet, and advanced communications services to homes and businesses in

¹ Letter from Mark A. Reger, Chief Financial Officer of the Federal Communications Commission, to David
R. Conn, Deputy General Counsel of McLeodUSA Telecommunications Services, Inc., Request for Waiver of Late

twenty-five states. As required by section 1.1154 of the Commission's rules, 47 C.F.R. § 1.1154, McLeodUSA submitted its 2002 regulatory fee payment by sending a check for \$368,359.10 via first-class mail from its headquarters in Cedar Rapids, Iowa to the appropriate Mellon Bank address in Pittsburgh, Pennsylvania on September 20, 2002, five days before the September 25, 2002 deadline for 2002 regulatory fees. In December 2002, McLeodUSA received an invoice from the Commission requesting that the Company pay the Commission an additional \$92,064.78 to cover a 25% late penalty fee on McLeodUSA's 2002 regulatory fee payment. McLeodUSA's records show that Mellon Bank cashed the check on September 26, 2002, one day after the deadline, but it has not been established when Mellon Bank actually received McLeodUSA's check for its 2002 regulatory fees.

On December 18, 2002, McLeodUSA requested that the Commission's Managing Director waive the late penalty because it had previously waived a penalty for a regulatory fee payment mailed five days before the fee deadline from a location further than McLeodUSA's headquarters and during a time when mail service problems were well-known and widespread.² McLeodUSA also explained how the regulatory fee system raises constitutional questions. On March 24, 2003, the Office of the Managing Director sent a letter denying the waiver request without adequately addressing McLeodUSA's arguments.³ McLeodUSA now files the instant Application for Review of the OMD Decision by the Commission.

Charge Penalty for FY 2002 Regulatory Fees, Fee Control No. 00000RR06-03-063, dated March 24, 2003 ("*OMD Decision*").

² Letter from David R. Conn, Deputy General Counsel of McLeodUSA Telecommunications Services, Inc., to Andrew S. Fishel, Managing Director of the Federal Communications Commission, Request for Waiver of Late Penalty, Bill No. FY02-9-0005, dated December 18, 2002 ("*McLeodUSA Waiver Request*").

³ See *OMD Decision* at 2.

II. DISCUSSION

A. The Decision Should be Revised to Comply with Commission Policy

As McLeodUSA explained in its waiver request, the Commission has previously waived a late penalty for regulatory fees that were mailed five days before the regulatory fee deadline.⁴ In denying McLeodUSA's request, the OMD Decision did not adequately explain why the Commission should change that policy here.⁵

Specifically, in 2001, West Beach Broadcasting, Corp. ("West Beach") mailed its regulatory fee payment from its offices in Washington State five days before the regulatory fee deadline that year⁶ – a deadline that had been moved forward by five days due the Commission's recognition of the widespread "disruption and cancellation of mail and air courier service throughout the United States following the events of September 11, 2001."⁷ The Commission granted West Beach's late penalty waiver request, noting that "even the best of planning" did not prevent the check from being received by the Mellon Bank until one day after the deadline due to the continued disruption of the mail service during that time.⁸

Like West Beach, McLeodUSA made a good faith effort to timely submit its regulatory fee payment to the Commission by sending its payment five days before the deadline. Indeed, McLeodUSA's efforts are even more reasonable than West Beach given that McLeodUSA sent the payment from a location over 1,900 miles closer to the Pennsylvania Mellon Bank address

⁴ *McLeodUSA Waiver Request* at 2-3.

⁵ *See OMD Decision* at 2.

⁶ Letter from Richard A. Bell, General Manager of KWDB 1110 AM, and James Tilton, President of West Beach Broadcasting Corp., to Ms. Donohue of the Credit and Debt Management Group, Federal Communications Commission, Bill No. 2002-9-2032, dated Mar. 19, 2002 ("*West Beach Waiver Request*").

⁷ Letter from Mark A. Reger, Chief Financial Officer of the Federal Communications Commission to James Tilton, West Beach Broadcasting, *Fee Waiver Request for Station KWDB*, Fee Control No. 01928835078007, dated May 30, 2002, at 1 ("*West Beach Decision*").

⁸ *Id.*

than West Beach during a time when there were no known major disruptions in the mail service as was the case when West Beach mailed its payment in September of 2001.

Importantly, while the events of September 11, 2001 were “clearly unforeseeable,” the widespread disruption in the mail service that was occurring at the time the 2001 regulatory fees were due, clearly was not, as evidenced by the Commission’s decision to move the regulatory fee filing deadline forward by five days due to the “disruption and cancellation of mail and air courier service throughout the United States” during that time.⁹ Moreover, if the Commission believes that five days was a sufficient amount of time for a regulatory fee payment to be received by the Mellon Bank from Washington State during a time when major mail disruptions were well-known, then five days is clearly a sufficient amount of time for a regulatory fee payment to be received by the Mellon Bank from a state 1,900 miles closer during a time when no widespread disruptions of mail service in the mail service were occurring.

The OMD Decision, however, does not adequately address these inconsistencies in the Commission’s policy for granting regulatory fee penalty waiver requests, but rather merely cites to the “extraordinary circumstances” and “clearly unforeseeable” events of September 11, 2001 as not applicable in this case.¹⁰ The Commission, however, did not routinely grant all late penalty waiver requests for 2001 regulatory fee payments. In fact, as described by McLeodUSA in its initial waiver request, the Commission denied another late penalty waiver request for regulatory fees mailed one day before the new 2001 deadline, noting that mailing the payment from Minnesota one day prior to the deadline did not demonstrate that the company mailed the payment in sufficient time for it to reach the Mellon Bank in Pennsylvania.¹¹

⁹ *Id*

¹⁰ *OMD Decision* at 2.

¹¹ See McLeodUSA Waiver Request at 2, n.2 (citing Letter from Mark A. Reger, Chief Financial Officer of the Federal Communications Commission, to Michael O. Ostbye, Rural Services of Central Minnesota, Fee Waiver

The West Beach case therefore does not stand for the proposition that the Commission's policy for granting regulatory fee penalty waivers is that the "extraordinary circumstances" and "clearly unforeseeable" events of September 11, 2001 warranted waivers of regulatory fee penalties issued in 2001. Rather, the Commission's policy for late penalty fee waiver requests is that mailing a regulatory fee payment from a location as far as Washington State at least five days before the deadline during a time of major mail disruption warrants a penalty waiver because such circumstances demonstrate that the regulatee mailed the payment in sufficient time for it to be timely received by the Mellon Bank in Pennsylvania.

Accordingly, the Commission should follow this policy and grant McLeodUSA's penalty waiver request given that its 2002 regulatory fee payment was mailed five days prior to the deadline from a location closer than Washington State when mail service was not experiencing major disruptions that would otherwise lead one to expect a delay in receipt by the Mellon Bank in Pennsylvania. Moreover, as the Commission stated in the West Beach decision, mailing payment five days before the deadline "under *normal* circumstances, would have allowed sufficient time for it to be received by the Commission in a timely manner."¹² But, even under normal circumstances mail delays occur, and a company should not be penalized, particularly a 25% penalty, for an interruption it cannot control.¹³ Granting a waiver to McLeodUSA would avoid an unduly harsh penalty given the facts, and would be appropriate and proper because

Request, Fee Control No. 00000RROG-02-023, dated May 1, 2002, at 1 ("We find that the facts do not support [Rural Services'] assertion that [Rural Services] mailed the FY 2001 regulatory fee in sufficient time for it to be timely received by the Commission on September 26, 2001.").

¹² See *West Beach Decision* at 1 (emphasis added).

¹³ McLeodUSA also notes that the Commission has not established that McLeodUSA's payment check was not received by the Mellon Bank by September 25, 2002. While McLeodUSA's records show that the check was cashed by the Mellon Bank on September 26, 2002, it seems entirely possible that the check may have been received by the Mellon Bank on September 25, 2002, but cashed the next day, particularly given that a large number of checks likely were received by the Mellon Bank on the filing deadline.

McLeodUSA made a good faith and reasonable effort to timely submit payment of its regulatory fees as West Beach did, for which the FCC has granted a similar waiver request.

B. The Penalty and Fee Schemes Conflict with Established Legal Authority

As McLeodUSA explained in its initial waiver request, the Commission's FY 2002 regulatory fee system, including the late penalty fees, raises constitutional issues, which the OMD Decision did not adequately address. The Origination Clause of the Constitution, Article I, Section 7, Clause 1, requires that "all Bills for raising Revenues [to] originate in the House of Representatives."¹⁴ In *United States v. Munoz-Florez*, 495 U.S. 385 (1990), the Supreme Court held that revenue to support a particular program specified by federal statute is constitutional even though the statute may not have originated in the House of Representatives. While the Commission may have implemented its regulatory fee system under section 9 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 159, that system, however, does support a particular government program, but instead raises revenue to support the government generally.¹⁵

In denying McLeodUSA waiver request, the OMD Decision cites to the relevant case law, including the *Munoz-Florez* case, but does not specifically rule on the constitutional issues.¹⁶ Importantly, the OMD Decision does not demonstrate how the regulatory fee system falls under the *Munoz-Florez* exception to the Origination Clause requirements. Other than the factual statement that "regulatory fee requirement implements Section 9 of the Communications

¹⁴ U.S. Const. Art. I, § 7, cl. 1.

¹⁵ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2002*, Report and Order, 17 FCC Rcd. 13202, at ¶¶ 1-8 (2002) ("*FY 2002 Regulatory Fees Report and Order*"). "Section 9(a) of the Communications Act of 1934, as amended, authorizes the Commission to assess and collect annual regulatory fees to recover its regulatory costs." *Id.* at ¶ 4; see also 47 U.S.C. § 159.

¹⁶ See *OMD Decision* at 2.

Act of 1934, as amended,” there is no explanation in the OMD Decision of whether or how the regulatory fee system is constitutional.¹⁷

Moreover, section 9 of the Act does not create a particular program for which the regulatory fees are used to support, but instead raises revenues to support the Commission generally.¹⁸ In other words, regulatory fees are actually taxes on licensees because the appropriations by Congress are made without regard to specific programs that benefit specific licensees. Thus, because the Commission’s FY 2002 regulatory fee scheme was adopted by the Commission, not by the House of Representatives, and raises revenue for the federal government generally, and not for a specific program, the FY 2002 regulatory fee system, including the late penalty fees, likely is unconstitutional.

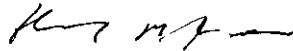
¹⁷ *Id.* McLeod USA further notes that in another regulatory fee late penalty proceeding in which similar constitutional issues were raised, the Commission admitted that “there was some ambiguity concerning the Commission’s policies for implementation of the provisions of Section 9 of the Act, 47 U.S.C. § 159(c)(1), requiring assessment of a 25 percent penalty for late payment.” Letter from Mark A. Reger, Chief Financial Officer of the Federal Communications Commission, to Dennis J. Kelley, Esq., Late Charge for Regulatory Fees for FY 1998, Fee Control No 00000RR0G-02-0216, dated June 24, 2002. Based on these ambiguities, the Commission granted the waiver request in that case. *Id.* In this case, the OMB Decision does not explain how there could be “ambiguities” in the 1998 regulatory fee system warranting a grant of a late penalty waiver that do not occur in the 2002 regulatory fee system in warranting a similar late penalty waiver grant.

¹⁸ See 47 U.S.C. § 159; see also *FY 2002 Regulatory Fees Report and Order* at ¶¶ 1-8.

III. CONCLUSION

WHEREFORE, for the foregoing reasons and for those contained in its initial waiver request, McLeodUSA Telecommunications Services, Inc. respectfully asks that the Commission overturn the Managing OMD Decision issued on March 24, 2003 and set aside the \$92,064.78 late payment penalty imposed on McLeodUSA.

Respectfully submitted,



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